90-564



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HARRY MORGAN

Petitioner

v.

ANR FREIGHT SYSTEM, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether or not the Tenth Circuit's decision is in direct conflict with this Court's mandates in both Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)?

2. Whether or not the Tenth Circuit's decision unnecessarily restricts the McDonnell-Douglas framework as applied to Reduction-in-Force cases under the Age Discrimination in Employment Act?

3. Whether or not economic reasons for a reduction-in-force rebut the prima facie case of discrimination?

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CONSTITUTIONAL PROVISIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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HARRY MORGAN, Petitioner,

v.

ANR FREIGHT SYSTEM, INC., Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner, Harry Morgan respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on April 20, 1990.

## OPINIONS BELOW

The opinion of the United States District Court of Kansas is reproduced herein as Exhibit A.

The opinion of the Court of Appeals for the Tenth Circuit is reproduced herein as Exhibit B.

## JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. Section 621 et. seq., Petitioner Harry Morgan brought this suit in the United States District Court of Kansas. On January 10, 1989 the District Court granted the Respondent's motion for summary judgment. See Appendix A.

On Petitioner's appeal, the Tenth Circuit on April 20, 1990 entered a judgment and an opinion affirming the District Court's Order. See Appendix B.

A Petition for Rehearing was filed on May 7, 1990. See Appendix C.

The Appeals Court denied the Petition for Rehearing on June 7, 1990. See Appendix D.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. Section 1254 (1).

## STATUTES AND CONSTITUTIONAL PROVISIONS

7th Amendment

"Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *"

29 U.S.C. Section 623(a)

It shall be unlawful for any employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

## BASIS OF FEDERAL JURISDICTION

The United States Court of Appeal for the Tenth Circuit had juridiction over this case by virtue of 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

This action for both legal and equitable relief under the Age Discrimination in Employment Act of 1967 (ADEA) as amended, 29 U.S.C. 621, et seq, was filed on May 21, 1987 in the United States District Court for the District of Kansas, by Petitioner, Harry Morgan.

At age 57, Harry Morgan (hereafter "Petitioner") was laid off from his job as a terminal manager for the Iola and Fort Scott, Kansas operations of ANR Freight Systems, Inc. (hereafter "Respondent" or "Company"), a job he had held since 1972. During his many years of employment, Morgan had advanced from salesman to terminal manager, was responsible for two terminals, and supervised nine employees. Over the years, the Company had consistently evaluated Morgan's performance as totally

satisfactory.

On February 21, 1986, the Company told Morgan that he was laid off, effective immediately, as part of a reduction in force (hereafter "RIF"). Fourteen salaried employees were laid off in the Kansas City Region where Morgan was employed, eight of whom were age 40 or older. At the time the Company laid off Morgan, it retained younger employees in positions similar to Morgan's for which he was qualified. Specifically, the Company retained twelve younger employees who were terminal managers or who held similar managerial positions.

Seven weeks after the reduction in force, the Company recalled a younger employee, Scott Mann, whom Morgan had trained and supervised, as a Territorial Manager for the Iola, Kansas terminal where

Mr. Morgan had been employed. As a Territorial Manager, Mann performed the exact same duties and responsibilities that Morgan had previously performed prior to his layoff, including operations duties which Mann had not handled before Morgan was laid off. Although he had not applied for the position, the younger employee, Mann, was recalled rather than Morgan.

Since the reduction in force in 1986, the Company has hired or promoted 30 individuals into terminal manager positions or similar managerial positions as Morgan held in the Kansas City Region. The Company did not rehire, recall, or consider Morgan for these positions despite the fact that he was qualified for them.

In its motion for summary judgment, the Company did not present any evidence explaining its reason for laying off Morgan

rather than other younger employees. Nor did it present any reason why the younger employee Mann was recalled instead of Morgan. The only explanation given by the Company for not recalling Morgan for any of the open positions after the RIF was that Morgan had not formally applied.

In opposition to summary judgment, Morgan presented evidence showing that the company was solely concerned with reducing a "specified percentage of salary dollars" which resulted in the targeting of individuals based on how much money they made. The Company did not consider performance, qualifications, or experience in deciding who was to be let go or retained.

In reviewing the above evidence on cross-motions for summary judgment, the District Court found in favor of the

Company. The District Court ruled that Morgan failed to establish a prima facie case based on its finding that the rehiring of a younger employee did not constitute retaining a younger employee. Even if Morgan had established a prima facie case, the District Court held that the Company had proffered a legitimate reason, specifically economic conditions, for the reduction in force.

The District Court considered the evidence that younger workers were recalled and newly hired after the RIF as relevant only to a separate claim of failure to hire, not as proof of pretext for the selection of Morgan for the RIF itself. Viewed in this light, the District Court concluded that Morgan had no claim for failure to hire because he had not applied for the open positions. As a result, the

District Court entered summary judgment for the Company.

In due course, Morgan took an appeal to the Tenth Circuit. The Petitioner invoked the Tenth Circuit's jurisdiction under 28 U.S.C. Section 1291 to review "final decisions" of district courts. On April 20, 1990 the Tenth Circuit entered its order affirming the District Court's order for summary judgment. In its order the Tenth Circuit held there were no genuine issues of material fact and that Morgan failed to present any evidence of discriminatory age animus.

The Tenth Circuit accordingly affirmed the District Court's order granting Respondent summary judgment.

## REASONS FOR GRANTING THE WRIT

### I.

THE TENTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER GRANTING RESPONDENT SUMMARY JUDGMENT IS IN DIRECT CONFLICT WITH THIS COURT'S MANDATES IN BOTH LYTLE V. HOUSEHOLD MFG., INC., 110 S.CT. 1331 (1990) AND ANDERSON V. LIBERTY LOBBY, INC. 477 U.S. 242 (1986) AND HAS RESULTED IN THE CONSTITUTIONAL DEPRIVATION OF PETITIONER'S 7TH AMENDMENT RIGHT TO A JURY TRIAL.

The Tenth Circuit's decision affirming the District Court's order granting Respondent summary judgment is in direct conflict with this Court's mandate in Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990) and with Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986).

In Lytle v. Household Mfg. Inc., 110 S. Ct. 1331 (1990), this Court unanimously reversed a dismissal by a district court, finding that the district court had improperly taken the case from the jury. Justice Marshall in delivering the opinion

of the Court in Lytle noted that a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b), and then not take the same case from the jury because it might believe that the jury could reasonably find for the non-moving party. In Lytle, the Plaintiff did not receive a jury trial because of an "erroneous ruling" dismissing his jury claims. Like Lytle, Petitioner Harry Morgan also has been deprived of his constitutional right to a jury trial because of an "erroneous ruling". The "erroneous ruling" in Morgan's case results from the lower court's failure to properly apply the principles set out in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). This misapplication of the law has resulted in the constitutional deprivation of Morgan's

Seventh Amendment right to a jury trial.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) this Court held that in considering a motion for summary judgment, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. The Court stated: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor". 477 U.S. at 255.

The conflict between the Tenth Circuit's decision and this Court's decisions in Lytle and Anderson could not be more complete. The Tenth Circuit completely failed to draw all factual

inferences in favor of Morgan, improperly engaged in the prohibited activity of weighing the evidence and failed to recognize instances of genuinely disputed factual issues./[1] Had the evidence been

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[1] The District Court and Tenth Circuit both engaged in improperly weighing the evidence and failed to construe the facts in the light most favorable to Morgan as required under Fed. R. Civ. P. 56, see Gray v. Philips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). For example, both courts noted the dispute between the parties as to whether Morgan was laid off or terminated (Appendix A and B), however, both courts improperly weighed the evidence and made the factual determination Morgan was terminated. This was a genuine issue of material fact and was an issue for the jury. This led the Tenth Circuit into a thoroughly improper analysis of ANR's failure to recall Morgan. This misapprehension operated against Morgan on the prima facie proof as well as on the question whether the motive stated by ANR was a legitimate nondiscriminatory one.

Both lower courts also improperly made the factual determination Morgan was terminated because of ANR's unprofitable operations nationwide. Morgan presented substantial evidence that the dire economic conditions did not exist. This evidence was completely disregarded by the Tenth

construed in Morgan's favor, the evidence was sufficient to establish a prima facie case and was sufficient to preclude summary judgment.

Granting summary judgment against Morgan was clearly improper in light of this Court's ruling in Lytle and Anderson. There is no question that had the court followed Anderson and construed the facts in favor of Morgan (the nonmoving party), a jury could have reasonably found in favor of Morgan. Therefore, dismissal of Morgan's ADEA claim was improper in light of this Court's mandate in Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990).

The Seventh Amendment preserves the

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Circuit. Placed in the correct light, Morgan's evidence at the very least created a disputed factual issue and was an issue for the jury. This misapprehension operated against Morgan on the question of pretext.

right to trial by jury. Had the District Court and the Tenth Circuit not erroneously dismissed Morgan's ADEA claim, Morgan would have been entitled to a jury trial. As a result of the lower courts' erroneous dismissal Morgan did not have a full and fair opportunity to litigate his claims of discrimination. The Tenth Circuit's findings cannot be deemed to have been the result of a full and fair opportunity to be heard since the Seventh Amendment to the Constitution requires a jury trial be given. This Court has always demonstrated an abiding resolve to enforce the command of the Seventh Amendment.

The judgment and opinion by the Tenth Circuit misapplies the holding by the Supreme Court in Lytle v. Household Mfg., Inc., 110 S. Court 1331 (1990), and other cases of the Supreme Court dealing with

such issue, and Writ for Certiorari must be granted for such opinion to accord with the holdings in Lytle and Anderson v. Liberty Lobby, Inc. To allow the Tenth Circuit's judgment and opinion to stand would infringe on Petitioner's Seventh Amendment right to a jury trial.

The Tenth Circuit's decision is directly at odds with this Court's ruling in Lytle and Anderson v. Liberty Lobby. The Tenth Circuit's decision sets a dangerously confusing precedent and plenary consideration of the matter by this Court is essential.

## II

## THE TENTH CIRCUIT'S DECISION THAT MORGAN FAILED TO PRODUCE EVIDENCE SUFFICIENT TO ESTABLISH THE FOURTH PRONG OF THE PRIMA FACIE TEST IS IN ERROR AND IS INCONSISTENT WITH ITS OWN PRIOR CASE LAW AND OTHER FEDERAL COURTS.

The Tenth Circuit's decision that

Morgan failed to produce evidence sufficient to establish the fourth prong of the prima facie test is in error and is inconsistent with its own prior case law and other Federal Courts. The Tenth Circuit held in Branson v. Price River Coal Co., 853 F.2d (10th Cir. 1988) the fourth element in a Reduction in Force case required the employee to present some evidence that the older employee was treated less favorably than the younger employee. The Tenth Circuit stated:

> Evidence that the employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent to require the employer to articulate reasons for its decision.

853 F.2d at 771. The standard set forth in Branson is consistent with that of other circuits holding that it is sufficient for the employee to show that he was discharged

while the company retained younger employees. See Montana v. First Federal Savings & Loan Association, 1989 WL 14948 (2nd Cir. 1989); Healy v. New York Life Insurance Co., 860 F.2d 1209 (3rd Cir. 1988); Herold v. Hajoca Corp., 864 F.2d 317 (4th Cir. 1988).

The Tenth Circuit disregarded their own test as set out in Branson, when reviewing the evidence in Morgan's case.

Morgan presented evidence more than sufficient to satisfy the fourth element.

Morgan presented to the District Court and Tenth Circuit substantial evidence he was treated less favorably than younger employees. Both lower courts had before them evidence including but not limited to:

1. ANR's own admission that at the time Morgan was laid off, persons younger and less qualified than Morgan were retained in managerial positions in the Kansas City Region for which Morgan was equally or more qualified.

2. ANR's own admission that at the time Morgan was laid off, ANR retained 12 persons, all younger with less years experience with ANR in terminal manager or similar managerial positions in ANR's Kansas City Region. In addition ANR retained more than 50 persons, all younger and with less experience with ANR in terminal manager or similar managerial positions in ANR's other regions.

3. Evidence that Scott Mann who was younger than Morgan, had worked under him in Iola, and many fewer years with ANR was recalled by ANR within a few weeks of the reduction-in-force and assumed Morgan's job duties.

4. That Morgan trained and supervised Mann.

5. ANR's managerial employees' admissions that its sole criterion in cutting its work force was reducing the amount it paid in salaries.

6. Evidence of 13 other ADEA lawsuits against ANR. One lawsuit involving ANR's Kansas City Region.

7. Evidence that the reduction-in-force disproportionately affected ANR's older employees. For example, four of the five affected terminal managers in ANR's Kansas City Region were in the protected age group and 8 of the 14 affected employees in ANR's Kansas City Region were in the protected age group.

8. The fact that since February 21, 1986 ANR admits it has hired terminal managers and operations managers in ANR's Kansas City and other terminals all who are younger than Morgan and have less years experience in the trucking industry and with ANR Freight System.

9. The fact that since February 21, 1986 ANR has rehired persons, all who had been hired after Morgan was laid off, had less experience in the trucking industry and with ANR.

10. ANR's admission that neither qualifications, experience, nor work records were considered, nor were any evaluation procedures used based on job performance and qualifications.

This evidence was more than sufficient to satisfy Morgan's burden on the prima facie case but was overlooked by the court. There can be no doubt Morgan was treated less favorably than younger employees. All that was required of Morgan was to show some evidence of less favorable treatment than younger employees. This, Morgan did.

The focus in a reduction-in-force case is less on why employees, in general are discharged and more on why the older

employee rather than another employee was discharged. Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633, 644 (5th Cir. 1985). The Tenth Circuit Court failed to focus on why Morgan was discharged, instead of focusing on the reason for the reduction-in-force. Their decision is not only contrary to other Federal Courts but is contrary to its own mandate in Branson. The Federal Courts are very clear on this issue -- evidence that younger employees were retained is sufficient to establish a prima facie case. Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988). The Tenth Circuit in this case misapplied the legal standards for evaluating age discrimination claims arising from reduction in force. As a result the Court's decision has jeopardized the protections guaranteed by the ADEA to Morgan and all other older

workers.

The Tenth Circuit's rigid application of the McDonnell Douglas framework also offends the Supreme Court's admonition in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). In Furnco, the Supreme Court emphasized that the McDonnell Douglas analysis was not mechanistic or rigid and that the essential inquiry is always whether younger employees were treated more favorably. Focusing on the comparable treatment of older and younger workers as a result of the RIF achieves the purposes of the McDonnell Douglas proof scheme. As the Seventh Circuit explained in Oxman v. WLS-TV:

> This formulation merely requires an employer that releases a protected employee while simultaneously hiring (or not "bumping") younger employees to fill positions for which the older employee was qualified to explain its actions without forcing the protected employee to uncover that elusive "smoking gun".

When the McDonnell Douglas analysis is properly applied to the facts here, it is clear that the older employee established a prima facie case through evidence that younger employees were recalled as well as retained. Summary judgment was clearly improper.

For the above reasons plenary consideration of this matter by this Court is essential.

III

THE TENTH CIRCUIT'S DECISION THAT ECONOMIC REASONS FOR A REDUCTION-IN-FORCE REBUT THE PRIMA FACIE CASE OF DISCRIMINATION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS.

According to ANR the decision to lay off Morgan and not rehire him as "strictly a business decision based on the depressed state of the trucking industry and the economic situation in the region and at the terminals where [he] was employed". ANR

offered in support only the affidavit of its general counsel, Bruce Bullock with no supporting documentation./[2] The Tenth Circuit affirmed the district court's holding that the company had proven its articulated reason for laying off Morgan.

The Tenth Circuit's decision that economic reasons for a Reduction-in-Force rebut the prima facie case of discrimination is in direct conflict with

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[2] Morgan presented significant evidence that the dire economic conditions did not exist. Morgan presented to the district court documentary evidence that showed (1) the company and the terminal where Morgan worked was operating at a profit; (2) the company was expanding its operations; and (3) the company was recalling and hiring younger persons in positions for which Morgan was qualified. This evidence was disregarded by the court. Placed in the correct light Petitioner's evidence at the very least created a disputed factual issue which precluded the entry of summary judgment as mandated by this court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990).

decisions of other Federal Courts./[3] Federal Courts consistently hold that general economic considerations simply do not respond to the prima facie case or the ultimate issue of whether age was used in deciding which employees would be laid off, discharged or retained. Khan v. Grotnes Metalforming Systems, Inc., 679 F.Supp. 751 (N.D. Ill. 1988); Uffelman v. Lone Star Steel Co., 863 F.2d 404 (5th Cir. 1989).

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[3] Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751 (N.D. ILL. (1988); Uffelman v. Lone Star Steel Co., 863 F.2d 404 (5th Cir. 1989); Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987); Metz v. Transit Mix, 828 F.2d 1202 (7th Cir. 1987); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Wolfe v. Time Inc., 702 F. Supp. 1045 (S.D.N.Y. 1989); Montana v. First Federal Savings and Loan Association, 1989 WL 14948; Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981); Laugeson v. Anaconda Co. 510 F.2d 307 (6th Cir. 1975); Marshall v. Arlene Knitwear, 454 F.Supp. 715 (E.D.N.Y. 1978); Valenti v. International Mill Service, Inc., 634 F.Supp. 57 (E.D. Pa. 1985).

These courts have consistently held that a company must explain why the older employee was selected for lay off and younger employees were not. For example, employers in other RIF cases have argued that the younger worker was more qualified/[4] or had broader skills than the older employee./[5] In this case, however, the Company did not articulate any reason for the older employee's lay off other than that he was being let go under the Reduction-in-Force./[6] The Tenth Circuit's decision permitted ANR to lay off Morgan without requiring the company to articulate a specific reason for not retaining Morgan or

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[4] Branson, 853 F.2d at 772.

[5] Lucas v. Dover Corp., 857 F.2d 1397, 1403 (10th Cir. 1988).

[6] The company admitted it did not base its decision on qualifications, experience or job performance.

for not recalling him in addition to establishing the business reasons for the Reduction-in-Force. The sole reason proffered by the company here which the Tenth Circuit accepted was the economic conditions for the Reduction-in-Force itself. That reason alone is legally insufficient to respond to the inference created by the prima facie case that the Company implemented the RIF in a discriminatory manner./[7] The conflict

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[7] The Tenth Circuit and the District Court failed to credit a variety of evidence attacking the validity of the Company's reasons for laying off and not rehiring Morgan, as well as questioning the alleged economic reasons for the RIF. For example, while the company alleged that Morgan's position was eliminated and the terminal was being closed, the evidence showed that the company recalled a younger employee to perform most if not all of the functions of Morgan's job at the same terminal, just seven weeks after the RIF. This evidence challenged the legitimacy of the company's selection of Morgan for lay off and its failure to rehire him. At the very least, the evidence created a genuine

between the other federal courts and the Tenth Circuit could not be more complete.

The Federal Courts have held that evidence of younger workers hired in similar positions to the older employee's position that was allegedly eliminated demonstrates that the business reasons of reducing the work force were a pretext for terminating the older worker. Anastasio v. Schering Corp., 838 F.2d 701, 706 (3rd Cir. 1988). See also Wolfe v. Time, Inc., 702 F.Supp. 1045, 1048 (S.D.N.Y. 1989), where the court found that the Company's hiring of a younger worker to perform the

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issue of material fact in dispute that necessitated close examination of the qualifications of the older employee and the younger employee and the functions and responsibilities of the positions in issue --- which preclude summary judgment. Equally significant was the substantial evidence presented by the employee concerning other younger rehires and newly hired younger workers.

functions of the older employee just ten months after his termination precluded summary judgment for the company.

Similarly, in Graefenhain v. Pabst Brewing Co., 827 F.2d 13, the Seventh Circuit held that the legitimacy of a RIF was undermined by the hiring of younger employees to fill the older employees' positions --- such that the net result was no reduction in the number of employees. In Graefenhain, the evidence showed that a 29-year-old employee essentially filled the older employee's position four months after the RIF. In addition, the position of another older employee had been split between two younger, less experienced employees eighteen months after the RIF. This evidence was sufficient for the Seventh Circuit to affirm the verdict for the employees.

The Tenth Circuit failed to analyze this case in light of the above-cited case law.

The Tenth Circuit also failed to scrutinize the company's articulated reason in light of developing case law and the legislative history of the ADEA. If it had, the court could not have granted summary judgment in favor of ANR.

Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987), involved the employer's discharge of a 54-year-old employee, the discharged employee being replaced by a younger person and the employee being replaced by a younger person and the employer justifying its action on economic grounds. The trial court entered judgment for the employer; the Court of Appeals reversed. The circumstance in Metz share a nearly precise identity with those

in the present case. The only difference is that Metz was not discharged along with other employee. This difference in circumstances according to the Metz court does nothing but make an even more air-tight case for Morgan than for Metz.

The court began its analysis with the observation that

> [t]he ADEA has consistently been interpreted by the administrative agencies charged with its enforcement and the courts to prohibit an employer from replacing higher paid employees with lower paid employees in order to save money.

Metz, 828 F.2d at 1205. The court goes on to quote from the EEOC guidelines as follows:

> A differentiation based on the average cost of employing older employees as a group is unlawful . . . 29 C.F.R. Section 1625.7(f) (1986).

Metz, 828 F.2d at 1205. The wholly consistant position adopted by the

Department of Labor, see 29 C.F.R. Section 860.103(h) (1979), when it administered the ADEA also is quoted. Concluding its discussion of the unanimity of opinion holding that elimination of older workers as a group based on their higher salaries constitutes impermissible age discrimination, the court cites a number of cases from other circuits. Metz, 828 F.2d at 1206.

The Tenth Circuit's decision is a complete departure from existing law. To permit this decision to stand creates a dangerous precedent. Under the Tenth Circuit's approach, companies could use economic necessity as the basis for wholesale terminations of older workers.

Moreover, the Tenth Circuit's acceptance of the Company's economic reasons improperly assumes that older

workers could be terminated because of their higher salaries. While reducing salary costs may be a legitimate business, allowing employers to terminate older employees based on their higher salaries would defeat the purposes of the ADEA. It would be in the best interests of the public to have this recurring and important issue considered by this Court.

## CONCLUSION

To have this issue resolved by this Court would be important to the public's interest and welfare. The issue is involved in numerous cases pending in lower courts thereby making desirable an early and definitive ruling by this Court.

There is a conflict between this decision by the Tenth Circuit and this Court's mandates in both Lytle v. Household

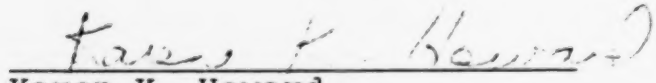
Mfg., Inc., 110 S.Ct. 1331 (1990) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). This conflict has resulted in the constitutional deprivation of Petitioner's Seventh Amendment right to a jury trial.

The Tenth Circuit failed to apply its own test as set out in Branson v. Price River Coal Co., 853 F.2d 768 and the test set out by other federal courts as to the fourth prong of the prima facie test in reduction in force cases.

The Tenth Circuit's decision that economic reasons for a reduction in force rebut the prima facie case of discrimination is in direct conflict with decisions of other federal courts. It would be in the interests of the public to have this recurring and important issue settled.

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

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HARRY MORGAN, Petitioner,

v.

ANR FREIGHT SYSTEM, INC. Respondent

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

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Certificate of Service

I hereby certify that three copies of the above Petition for Writ of Certiorari was mailed, postage prepaid, on this 27th day of September, 1990, to:

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K. Howard

Karen K. Howard

# APPENDIX A

## Opinion of the United States District Court for the District of Kansas

Filed January 10, 1989



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| HARRY MORGAN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CIVIL ACTION |
| vs. | ) | NO. 87-2239-0 |
| | ) | |
| ANR FREIGHT SYSTEMS, INC. | ) | |
| | ) | |
| Defendant. | ) | |

MEMORANDUM AND ORDER

This is an employee discrimination case in which plaintiff Harry Morgan ("Morgan") alleges that he was terminated by defendant ANR Freight Systems, Inc. ("ANR") in violation of the Age Discrimination in Employment Act (ADEA)" and the Employee Retirement Income Security Act ("ERISA")./[1] The matter is before the court on cross

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[1] The parties disagree as to whether plaintiff was "laid off" or "terminated" on February 21, 1986. However, unless ANR had a duty to either recall or rehire plaintiff, the distinction between layoff and termination is without a difference. For the sake of clarity, the court will refer to the complained-of actions as termination and failure to rehire.

motions for summary judgment.

In a motion for summary judgment, the movant need not negate the allegations of the nonmoving party. However, it must demonstrate that there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). This initial burden entails "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

When faced with a motion for summary judgment, the monmoving party may not simply rely upon its pleadings but rather

must set forth specific facts showing that there is a genuine issue for trial. Anderson, 477 U.S. at 248. Indeed, "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The test is whether the facts, viewed in the light most favorable to the nonmoving party, are such that a court may conclude that a reasonable jury could find for the nonmoving party, Anderson, 477 U.S. at 248.

I. ADEA Claims

A. Suits Under the ADEA

Allegations of discrimination under the ADEA are treated the same as those of discrimination under Title VII. Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988). The analysis that a district

court must follow in a Title VII case was recently reiterated by the Tenth Circuit:

> First, the plaintiff must present a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). This burden is satisfied by presenting a scenario that on its face suggests the defendant more likely than not discriminated against the plaintiff. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981). "The burden of establishing a prima facie case of disparate treatment is not onerous." Id. If this initial burden is fulfilled, the defendant must set forth non-discriminatory justifications for its allegedly discriminatory practices. Id. at 254-55, 101 S.Ct. at 1094-95. The burden of production placed on the defendant at this stage can be fulfilled by presenting nondiscriminatory reasons for its actions that are specific enough to provide the plaintiff with "a full and fair opportunity to demonstrate pretext." Id. at 256, 101 S.Ct. at 1095. "General assertions of good faith or of hiring only the best applicants . . . are insufficient." Payne v. Travenol Laboratories, Inc., 673 F.2d 789, 817 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 452, 74 L.Ed.2d 605 (1982). The Plaintiff then bears the ultimate burden of proving a statutory violation.

Pitre v. Western Elec. Co., Inc., 843 F.2d 1262 (10th Cir. 1988). Moreover, "It is

well settled that an ADEA plaintiff must establish that age was a 'determining factor' in the employer's challenged decision." Lucas v. Dover Corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988). (citation omitted).

The requirements for establishing a prima facie case of age discrimination were set forth in Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) and reiterated in Branson:

> a plaintiff must ordinarily show she was: (1) within the protected age group; (2) adversely affected by the defendant's employment decision; (3) qualified for the position at issue; and (4) replaced by a person outside the protected group.
>
> * * *
>
> In reduction-in-force cases, plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee. Consequently, courts have modified the fourth prima facie element by requiring the plaintiff to "produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." See e.g., Williams v. General Motors Corp., 656 F.2d 120,

> 129 (5th Cir. 1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982). This element may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force. See, e.g., Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 643-45 (5th Cir. 1985).

Branson, 853 F.2d at 770-71 (footnote and citation omitted). In this case, plaintiff alleges that he was discriminated against on the basis of his age in two respects: in being terminated and in not being rehired for numerous other positions within ANR.

B. Plaintiff's Termination

Defendant challenges plaintiff's prima facie case of discriminatory termination only with respect to the fourth element. Branson, holds that the bare fact of firing qualified, older employees while retaining younger employees in similar positions, "is sufficient to create a rebuttable presumption of discriminatcry intent and to require the employer to articulate reasons for its decision." Id. at 771. In the

case at bar, defendant rehired Scott Mann ("Mann"), one of the employees terminated along with plaintiff and Mann performed at least some of plaintiff's former responsibilities. However, plaintiff provides the court with no evidence whereby we could find that rehiring Mann several weeks after his termination was equivalent to "retaining" him. Even assuming that plaintiff has established a prima facie case, though, we find that he has failed to carry his ultimate burden of proving age discrimination.

Defendant has shown, the plaintiff himself acknowledged, that ANR's decision to terminate plaintiff resulted from a need to cut back on unprofitable operations in light of changed economic conditions. Affidavit of Bruce Bullock, Section 2-7; Deposition of Harry Morgan, pp. 46-48, 68-75. Because plaintiff has not produced any evidence from which a reasonable jury could

find that plaintiff's age was a determining factor in defendant's decision to terminate him, defendant's motion for summary judgment on this claim will be granted and plaintiff's will be denied./[2]

C. Failure to Rehire

Plaintiff claims that ANR should have considered him for any job openings it might have had after plaintiff's termination. In response, defendant relies on the undisputed fact that plaintiff never formally applied for any of the positions for which plaintiff claims he was qualified. Plaintiff replies that, by filing both a complaint with the Kansas Commission on Civil Rights and the instant

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[2] In an effort to impugn defendant's explanation of events, plaintiff cites a discussion in which one of defendant's employees asked plaintiff when he was going to retire. However, this employee was not involved in the decision to terminate plaintiff. Deposition of Walt Ainsworth, p. 36. Because plaintiff did not establish any link whatsover between that conversation and his termination, the conversation has no probative value.

petition, he "constructively applied" for jobs with defendant. Plaintiff's "constructive application" argument is based upon Taylor v. Battelle Columbus Laboratories, 680 F.Supp. 1165 (S.D. Ohio 1988). In Taylor, "plaintiff was given informal notice [of her impending termination] and was told that her case would be submitted to the Review Committee while a search was conducted within Battelle for alternative employment." Id. at 1169. In the case at bar, however, plaintiff was formally terminated, and defendant made no representations as to future employment. Deposition of Harry Morgan, p. 77. Accordingly, we reject plaintiff's argument that he should have been considered for any jobs within ANR because he "constructively applied" for all of them./[3]

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[3] Plaintiff also asserts that, under Section CP 106 of ANR's Policies and Procedures Manual, he should have been

Plaintiff also argues that reapplication was unnecessary because the employee allegedly now performing plaintiff's job (Scott Mann) was terminated and then later rehired without submitting an application. Absent application by plaintiff, the most that may be said is that Mann received a windfall, not that plaintiff was the victim of discrimination. While it is possible that defendant could have benefited elsewhere from plaintiff's experience in the trucking industry, the exercise of bad business judgment, by itself, is no violation of ADEA. Because plaintiff has not established that he applied for any of the jobs for which he claims he should have been considered, or established any other facts giving rise to a duty on the part of

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contacted about any job vacancies. As defendant points out, and plaintiff does not deny, the manual's procedures did not apply to employees of plaintiff's rank. As a result, the manual imposed no duty upon defendant to rehire plaintiff.

ANR to consider him for those jobs, he has failed to establish a prima facie case of discriminatory failure to rehire. Moreover, he has not shown that ANR's rehiring of Mann rather than himself was motivated by impermissible considerations.

II. ERISA Claim

Plaintiff also claims that his discharge violated Section 510 of ERISA (29. U.S.C. Section 1140). That law states that

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

The Third Circuit recently addressed the question of what must be proven in order for a plaintiff to prevail in a claim under section 510:

> Congress enacted Section 510 primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980); see

also Zipf v. American Telephone & Telegraph Co., 799 F.2d at 889, 891 ([3rd Cir.] 1986) (citing Butler); Donahue v. Custom Management Corp., 634 F.Supp. 1190, 1197 (W.D. Pa. 1986) (quoting Butler). To recover under Section 510, a plaintiff need not prove that "the sole reason for his [or her] termination was to interfere with pension rights." Titsch v. Reliance Group, Inc., 548 F.Supp. 983, 985 (S.D.N.Y. 1982), aff'd 742 F.2d 1441 (2d Cir. 1983) (emphasis in original). A plaintiff must, however, demonstrate that the defendant had the " 'specific intent' to violate ERISA." Watkinson v. Great Atlantic & Pacific Tea Co., Inc., 585 F.Supp. 879, 883 (E.D. Pa. 1984) (quoting Titsch, supra). Proof of incidental loss of benefits as a result of a termination will not constitute a violation of Section 510. See Titsch, 548 F.Supp. at 985 ("No ERISA cause of action [under Section 510] lies where the loss of . . . benefits [i]s a mere consequence of, but not a motivating factor behind, a termination of employment.").

Under the prevailing case law, and in accordance with the statutory language, the essential element of proof under Section 510 is specific intent to engage in proscribed activity. Proof of specific intent to interfere with the attainment of pension eligibility, then, "regardless of whether the interference is successful and regardless of whether the participant would actually have received the benefits absent the interference," Zipf, 799 F.2d at 893, will ordinarily constitute a violation of Section 510 of ERISA. In most cases, however, specific intent to discriminate

will not be demonstrated by "smoking gun" evidence. As a result, the evidentiary burden in discrimination cases may also be satisfied by the introduction of circumstantial evidence. See Maxfield v. Sinclair Int'l [.], 766 F.2d 788, 791 (3rd Cir. 1985) cert. denied, --- U.S. ---, 106 S.Ct. 796, 88 L.Ed.2d 773 (1986) (age discrimination). In the latter circumstances courts have developed "formula[s] . . . that enable[] the trial judge to sift through the evidence in an orderly fashion to determine the ultimate question in the case--did the defendant intentionally discriminate against the plaintiff[s]." Dillon v. Coles, 746 F.2d 998, 1003 (3rd Cir. 1984).

B.

As in the context of employment discrimination under Title VII, employees alleging discrimination under ERISA bear the burden of making out a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981) (refining McDonnell Douglas). To establish a prima facie case under ERISA Section 510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled. 29 U.S.C. Section 1140 (1982).

Gavalik v. Continental Can Co., 812 F.2d

834, 851-52 (3rd Cir.), cert. denied, ____ U.S. ____, 98 L.Ed.2d 492 (1987) (footnotes omitted). We believe that the Third Circuit's analysis is persuasive and sound. Accordingly, we hold that a plaintiff, to recover under Section 510, must demonstrate that a defendant unlawfully discriminated against him on account of his age, with a specific intent to interfere with plaintiff's pension rights. Moreover, the respective burdens on this issue tracks the allocation of burdens in a Title VII case, as developed in Burdine, supra.

In the case at bar, plaintiff has adduced no evidence, circumstantial or otherwise, to show that the alleged discrimination was for the purpose of depriving him of his pension benefits. Plaintiff does refer to a statement made by one of defendant's employees to the effect that termination decisions were made with a view to "least impacting the overall

profitability of the company." Deposition of Steve O. Emahiser, p. 30. However, the implication that this criterion included looking at those employees who were about to reach pension age was explicitly denied by that same employee. Id. In short, plaintiff has provided the court with no facts which would suggest that defendant possessed the specific intent required under Section 510. Because plaintiff's failure in this regard has been complete, defendant's motion for summary judgment on the ERISA claim will be granted and plaintiff's motion will be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is granted.

Dated this 10th day of December, 1988, at Kansas City, Kansas.

s/ Earl E. O'Connor, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
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| HARRY MORGAN | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CIVIL ACTION |
| | ) | NO. 87-2239-0 |
| ANR FREIGHT SYSTEMS, INC. | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

ORDER NUNC PRO TUNC

The clerk is hereby directed to substitute the attached last page of our order of January 10, 1989, in the above-captioned matter for that originally filed.

IT IS SO ORDERED.

Dated this 13th day of January, 1989, at Kansas City, Kansas.

s/ Earl E. O'Connor, Chief Judge

will be denied.

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is granted.

Dated this 10th day of January, 1989, at Kansas City, Kansas.

s/ Earl E. O'Connor Chief Judge

# APPENDIX B

Opinion of the United States Court of Appeals for the Tenth Circuit

Filed
April 20, 1990



UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| HARRY MORGAN<br><br>Plaintiff-Appellant,<br><br>v.<br><br>ANR FREIGHT SYSTEMS, INC., also known as Graves Truck Lines<br>Defendant-Appellee.<br><br>AMERICAN ASSOCIATION OF RETIRED PERSONS<br><br>Amicus Curiae. | ) | No. 89-3017<br>(D.C. No. 87-2239-0)<br>(District of Kansas) |

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ORDER AND JUDGMENT*[1]

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Before BALDOCK, BARRETT and BRORBY, Circuit Judges.

Plaintiff below, Harry Morgan (Morgan), appeals from the district court's grant of defendant-appellee ANR Freight Systems, Inc.'s (ANR) motion for Summary Judgment in

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[1] * This Order and Judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

this Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621, et seq., and Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140, et seq., action. The pertinent facts follow.

Since 1978, Morgan had been promoted by ANR, a national general commodity freight carrier, to serve as its terminal manager at Iola, Kansas. In addition, in 1984 he assumed managerial duties at the Fort Scott, Kansas, terminal. Morgan's duties involved both operations and sales. he satisfactorily performed his duties.

ANR experienced severe economic conditions due to recession, deregulation and increased operating costs, leading to a 1985 year-end net operating loss of $7,655,523. As a result, ANR undertook drastic measures in 1986 to decrease its operating expenses and to cut its losses, including a redution in salaried work force. Regional managers and district

sales managers of ANR were directed, nationwide, to examine their operations in order to target reductions in operating expenses, and to identify salaried positions that could be eliminated without significantly affecting ANR's ability to serve its customers. From these determinations, some 78 salaried persons were terminated nationwide, with 13 of these terminations affecting salaried employees in the Kansas City, Missouri, Region, including Morgan.

In the Kansas City Region, determinations relative to reductions in the salaried work force were made by Steve Emahiser, the Regional Operations Manager, and Cam Hill, the Regional Sales Manager. They were assisted by district sales managers, including Mr. Frank Hollingshead, whose district included the Iola/Fort Scott, Kansas, territory.

Job terminations in the Kansas City

Region included four terminal manager positions in smaller, outlying terminals, four territory sales managers, three dispatchers, one secretary and one cashier. The persons affected ranged from age 27 to age 57. Two of the three salaried personnel employed at the Iola, Kansas, terminal were eliminated, i.e., the terminal manager's position held by Morgan, who was then age 57, and the territory sales manager position held by Scott Mann, then age 49. The terminal secretary was retained. The Iola, Kansas, terminal was selected for reduction because of a declining economic condition in the area, and the belief that the terminal operation duties performed by Morgan and the sales duties performed by Mann could be handled by Jerry Near, the terminal manager at nearby Cherryvale, Kansas. Near was age 52.

Several weeks following the termination

of Morgan and Mann, ANR determined that the sales account load being handled by Jerry Near was excessive. Accordingly, ANR rehired Mann as its Iola, Kansas, territory sales representative. Mann testified by deposition that he performed only a few of the duties formerly performed by Morgan as terminal manager.

District Court Decision

On cross-motions for Summary Judgment on the ADEA claim, the district court concluded that there was no genuine issue of fact for trial and that Morgan had established (1) he was within the protected age group under the ADEA, (2) he had been adversely affected by ANR's employment decision, and (3) he was qualified for the position given to Scott Mann after Mann was recalled. The district court found, however that Morgan had failed to establish the fourth prong of his *prima facie* reduction-in-force case in that Morgan had

not produced any evidence that he was discriminated against on the basis of his age in either his termination or in not being rehired for other positions within ANR. With regard to Morgan's claim that ANR failed to consider him for any job openings following his termination, the district court found that when Morgan was terminated, ANR did not make any representations to him relative to future employment and that Morgan failed to apply for any other positions at ANR.

With regard to the ERISA claim, the district court concluded that Morgan failed to establish that ANR's "motivating factor" in Morgan's employment termination was to interfere with the attainment of Morgan's pension benefits.

Contentions on Appeal

On appeal, Morgan contends that the district court erred in granting ANR's motions for summary judgment on his ADEA

and ERISA claims because the district court improperly reviewed the evidence and misapplied principles of law.

Standard of Review

In reviewing the district court's order granting a motion for summary judgment, we must apply the same standard as that employed by the district court. Osgood v. State Farm Mut. Auto Ins. Co., 848 F.2d 141, 143 (10th Cir. 1988). The district court employed the standard that summary judgment should be granted "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

To survive the motion, the nonmoving party must "present evidence from which a jury might return a verdict in his favor."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). "Where different ultimate inferences may properly be drawn, the case is not one for a summary judgment. Luckett v. Bethelehem Steel Corp., 618 F.2d 1373, 1377 (10th Cir. 1980) (citations omitted). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., supra, at pp. 247-48 (emphasis in the original).

Discussion

I.

Morgan contends that the district court erred in granting ANR's motion for summary judgment on his Count I ADEA claim.

29 U.S.C. Section 623(a)(1) of the ADEA renders it unlawful for an employer to fail

or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

A.

The Termination Claim

Both Morgan and the American Association of Retired Persons (AARP), which filed an amicus curiae brief, argue that the district court's conclusion that there was no genuine issue of fact concerning ANR's motives in Morgan's "lay off" is clearly erroneous. They contend that the district court's conclusion that the company had proffered a legitimate reason for Morgan's "lay off" based on economic conditions is clearly erroneous and reflects a fundamental misperception about the application of the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) framework for

proving discrimination in a reduction-in-force case. They argue that rather than viewing all of the evidence relevant to the ultimate issue as to whether age was a determining factor in "laying off" Morgan, the district court applied a mechanistic approach rather than concentrating on whether Morgan was treated less favorably than younger employees. We observe that the district court's Memorandum and Order finds/concludes that Morgan was terminated rather than laid off (R., Vol. III, Doc. 96). We hold that the record supports the district court's conclusion and that there is no genuine dispute of material fact on that issue.

Morgan contends that the following evidence supports his contention that he was treated less favorably than younger employees, and further establishes his prima facie case:

> ANR's admission that at the time Mr. Morgan was laid off, persons younger and

less qualified than Mr. Morgan were retained in managerial positions in the Kansas City region for which Mr. Morgan was equally or more qualified. (Doc. 80 at 5; Doc 93 at 20-22). Evidence that Scott Mann, who was younger than Morgan had worked under him in Iola and had many fewer years with ANR, was recalled by ANR within a few weeks of the reduction-in-force and assumed Morgan's job duties. (Doc. 80 at 6).

ANR's admission that it did not search for another position into which Mr. Morgan could be placed. (Doc. 80 at 4-5).

ANR's statement that its sole criterion in cutting its work force was reducing the amount it paid in salaries. (Doc. 80 at 9-10).

Evidence of other ADEA lawsuits against ANR. (Doc. 80 at 11-12, 32-34; Doc. 93 at 14-15, 35-37).

Evidence that the reduction-in-force disproportionately affected ANR's older employees. For example, four of the five affected terminal managers in ANR's Kansas City Region were in the protected age group, (Doc. 76, Bullock Affidavit at 3), and eight of the 14 affected employees in ANR's Kansas City Region were in the protected age group. (Doc. 76, Bullock Affidavit at 3).

(Brief of Appellant, p. 15).

There is no evidence in the record rebutting ANR's contention that the company's reduction-in-force was undertaken

on a nationwide basis as a result of adverse economic conditions. Morgan has failed to submit credible evidence that ANR terminated him and failed to rehire him because ANR was motivated by age discrimination.

The record demonstrates that the thirteen salaried employees terminated in the Kansas City Region, seven of the thirteen were in the protected age group. In Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988), we held that in an ADEA suit the employer is not required to accord members of a protected class any preferential treatment, but only that employers must treat age neutrally. Thus, it is clear that the ADEA does not create a job priority based on age.

An employer does not violate the ADEA unless it is established that age was the "determining factor" in the employment decision. See E.E.O.C. v. Sperry Corp.,

852 F.2d 503 (10th Cir. 1988); E.E.O.C. v. Prudential Federal Savings & Loan Assoc., 763 F.2d 1166 (10th Cir.), cert. denied, 474 U.S. 946 (1985); Perrell v. Financeamerica Corp., 726 F.2d 654 (10th Cir. 1984). In this case, just as in Title VII, 42 U.S.C. Section 2000e cases, the employer has discretion to choose among equally qualified employees in any employment decision, provided that the decision is not based upon unlawful criteria. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). The question, then, is whether ANR terminated Morgan because his age was the "determining factor."

Clearly, Morgan's termination resulted from ANR's decision to eliminate his position as part of the company's nationwide reduction in force. The district court found that ANR undertook this action based upon its nationwide

unprofitable operations. Morgan's despositional testimony confirmed that. On the state of this record, there is no genuine issue as to that material fact. Morgan points to certain evidence reflecting that in 1984 and 1985 the Iola and Fort Scott terminals were operating at a profit and that ANR's Kansas City Region operated at a profit in 1984 and 1985. This was disputed by ANR. However, there was no evidence disputing the fact that the reduction in force was undertaken by ANR because of unprofitable operations nationwide.

We hold that Morgan did not present evidence from which a jury might return a verdict, finding that his termination was based upon discriminatory age animus. The district court did not err in granting ANR's motion for summary judgment.

Court's "[a]re not free to second-guess an employer's business judgment." Branson

v. Price River Coal Co., supra, at 772. See also Lucas v. Dover Corp., 857 F.2d 1397, 1403 (10th Cir. 1988) (In ADEA action held that "this court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives.") In our view, Morgan's contentions both before the district court and on appeal are simply challenges to ANR's business judgment. They do not serve as substitutes for proof that ANR eliminated Morgan's position and terminated his employment because of any age discrimination animus. "ADEA does not protect against generally unfair business policies, however objectionable; the act proscribes only discriminatory practices." E.E.O.C. v. Sperry Corp., supra, at 509.

In this record, certainly no evidence was presented that Morgan's age was the "determining factor." The evidence before the district court established that

Morgan's position as terminal manager was eliminated and Morgan was terminated in a nationwide bona fide reduction in force program.

Morgan insists that he satisfied the fourth prong of the McDonnell-Douglas test and met his burden of establishing a prima facie case by (1) ANR's admission that when Morgan was "laid off" some younger and less qualified terminal managers in the Kansas City Region were retained, (2) showing that ANR did not search for another position for Morgan following his "lay off," (3) showing that ANR's sole criteria in the reduction in force was to reduce salaries, (4) presenting evidence that other ADEA lawsuits had been filed against ANR, and (5) evidence showing that the reduction in force disproportionately affected older employees of ANR (Brief of Appellants, p. 15). We disagree.

First, the retention of some younger

employees does not, ipso facto, establish a discriminatory animus. Such evidence would be relevant if Morgan had demonstrated that some of the terminal managers retained in the Kansas City Region were not similarly situated, i.e., experience and job duties. No such evidence was presented. Second, Morgan admits that he did not apply to ANR for rehire. Third, although reduction of salaries was an intended savings, there is no evidence that Morgan's salary was the sole reason his position was eliminated. The determination was made that his duties could be assumed by Jerry Near, the terminal manager at nearby Cherryvale. Thus, this is not a case, as Morgan and AARP contend, like Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) where a 54-year old employee with 27 years of service was replaced by a younger, lower-salaried employee. Fourth, the filing of lawsuits is hardly evidence of one's "bad

acts" because no showing has been made therefrom that ANR had in fact violated the ADEA. Finally, although the impact on Morgan arising from his termination was difficult for him and did result in his inability to accrue pension benefits beyond those already vested and the loss of life insurance and medical benefits, there is nothing showing that ANR's rationale for his termination was merely a pretext for age discrimination. We hold that the evidence before the district court demonstrated that there was no genuine issue of material fact in contradiction to ANR's contention that it had a legitimate, business oriented, nondiscriminatory basis for the elimination of Morgan's terminal manager position.

The Recall Claim

Morgan argues that if the facts of this case had been properly analyzed by the district court, it would have concluded

that Morgan had been laid off rather than terminated. The significance of Morgan's "layoff" contention centers on the action of ANR's recall of Scott Mann, younger than Morgan, within seven weeks of Morgan's termination to assume "[t]he job responsibilities Morgan held at the Iola terminal prior to his layoff." (Brief of Appellant, p. 21). Morgan points out that at the time of their "layoffs," Mann was being paid a lesser salary than he, Mann had no training in terminal management nor any supervisory training, and Mann did not file an application for re-employment with ANR. Id.

Some seven weeks following the terminations of Morgan and Mann, ANR determined that the sales account was much more than Jerry Near could reasonably handle. Accordingly, Scott Mann was recalled because he had previously served as ANR's territorial sales manager for the

southeast Kansas area covered by the Iola terminal. Morgan contends, without factual support, that Mann assumed the job responsibilities of Morgan following his recall. Id. Mann gave deposition testimony that although he performed some operational duties as the only salaried employee at the Iola terminal, he did not perform the duties formerly performed by Morgan while Morgan was the terminal manager. Further, Mann testified that his duties have not really been expanded from those he performed before his termination.

Morgan argues that he established his prima facie case by showing that he was replaced by Scott Mann, a younger person. The record demonstrates, however, that as part of the reduction in force action, ANR eliminated Morgan's position as terminal manager at both the Iola and Fort Scott terminals, for economic reasons. At the same time that Morgan was terminated and

his positions eliminated, Scott Mann's position as sales manager was also eliminated and he, too, was terminated. ANR had determined that Jerry Near, its terminal manager at Cherryvale, Kansas, could assume the duties and responsibilities of both Morgan and Mann.

The district court ruled that because Morgan did not make formal application for rehire, he could not complain that ANR did not recall or rehire him. Morgan argues, however, that he should have been rehired for any of the positions nationwide that opened up with ANR since his termination. Morgan particularly contends that he should have been recalled to serve in the territorial sales manager position filled by Scott Mann.

Morgan acknowledges that he did not make application with ANR for any of the positions he claims that he should have been considered for. In Furnco

Construction Corp. v. Waters, 438 U.S. 567 (1978), a case involving a Title VII claim of racial discrimination in employment, the Supreme Court held that in order to satisfy the second prong of the McDonnell Douglas Corp. v. Green, supra, test in making out a prima facie case, it is necessary that a plaintiff show that he applied and was qualified for the job. While the Supreme Court held that the McDonnell Douglas rule was not inflexible, still there is nothing in that case or in International Bro. of Teamsters v. United States, 431 U.S. 324 (1977), upon which Morgan relies, supporting Morgan's contention that, based on the facts in this case, "Morgan's re-employment should not have depended on his submitting an application." (Brief of Appellant, p. 22).

In International Bro. of Teamsters, supra, the Supreme Court held that the Government had sustained its burden of

proving that there had existed a systemwide pattern or practice of employment discrimination against blacks and Spanish-surnamed persons in violation of Title VII. Measured against this background, the Court held that "[t]he company's assertion that a person who had not actually applied for a job can never be awarded seniority relief" must fail because "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to submit themselves to the humiliation of explicit and certain rejection." 431 U.S. at 365. Quite obviously, that case has no application here. To the contrary, in the case at bar Morgan has offered no evidence that it would have been futile had he applied to ANR for a position following his termination. Morgan did not offer any evidence that he expressed any interest in being rehired or that he made inquires

relative thereto.

Morgan's brief consistently refers to the proposition that he was "laid off" rather than "terminated." The district court found, however, that he was terminated, resulting "[f]rom a need to cut back on unprofitable operations in light of changed economic conditions." (R., Vol. III, Tab 96, p. 5). We agree. Morgan's insistence that he was "laid off" rather than "terminated" is consistent with his contention that he had a reasonable expection that he would be offered Scott Mann's position when it was reestablished. We have already held that Morgan was terminated. The record does not support Morgan's contention that Scott Mann was rehired by ANR to perform those duties of terminal manager previously performed by Morgan.

Throughout their briefs, both Morgan and the AARP have attempted to create the

requisite inference of age discrimination by arguing that: Scott Mann, when rehired, was younger than Morgan; some ANR employees who were younger and without as much experience as older employees were retained; salary savings was the intended result in the reduction in force; and other like lawsuits have been filed against ANR. The bent of these arguments, if taken to their logical conclusion, would require an employer to grant preferential treatment to its employees within the protected age group. Such a result was not intended by the ADEA. Branson v. Price River Coal Co., supra, 853 F.2d at 772; Yartzoff v. Oregon Employment Div. of Dept. of Human Resources, 745 F.2d 557 (9th Cir. 1984) (an age discrimination in employment plaintiff must establish that the condemned employment practices have a substantially disproportionate impact upon the protected class, and evidence that some younger

employees are doing the same job in the same positions is not sufficient evidence to establish discriminatory practices).

The ADEA simply requires that an employer reaches all employment decisions without regard to age. However, an employer is not required to show special, preferential treatment to members of a protected age class. "An ADEA plaintiff is not required to show that age was the sole motivating factor in the employment decision, but only that age was also a reason, and that age was the factor that made a difference." Cockrell v. Boise Cascade Corp., 781 F.2d 173, 179 (10th Cir. 1986).

Morgan did not present evidence to withstand ANR's motion for summary judgment on the issue that his age was the determining, motivating factor in his job termination or failure to recall. The district court did not err in granting

ANR's motion for summary judgment on Morgan's ADEA claim.

II.

Morgan contends that the district court erred in granting ANR's motion for summary judgment on Count II, the ERISA claim.

29 U.S.C. Section 1140 of ERISA (Section 510) provides, inter alia:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of the employee benefit plan, this Title, Section 3001 (29 U.S.C. Section 1201), or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this Title, or the Welfare and Pension Plans Disclosure Act . . . .

The district court, relying on Dillon v. Coles, 746 F.2d 998 (3rd Cir. 1984), ruled that in order for a plaintiff to prevail under Section 510, supra, he or she must demonstrate that the defendant employer had a specific intent to interfere with the

plaintiff's attainment of pension eligibility. The district court found that the record did not demonstrate that ANR terminated Morgan with a specific intent to interfere with his ERISA rights. We agree.

Notwithstanding that the Pretrial Order in this case clearly defined the ERISA issue, both under issues of fact and of law, i.e., whether ANR terminated or laid off Morgan with the specific intent of depriving him of his pension rights/benefits under ERISA (R., Vol. I, Doc. 36, pp. 9-10), on appeal Morgan argues that because of ANR's "[u]nlawful actions, Morgan lost an opportunity to accrue additional pension benefits, in addition to cancellation of his medical benefits, and reduced life insurance benefits . . . ." (Appellant's Brief, p. 27). The district court did not err in confining Morgan's ERISA claim to his pension benefits/rights. The pretrial order measures the dimensions

of a lawsuit, both in the trial court and on appeal pursuant to Fed. R.Civ. P. 16, 28 U.S.C.A. See Smith v. Ford Motor Co., 626 F.2d 784, 795 (10th Cir. 1980), cert. denied, 450 U.S. 918 (1981). Morgan's deposition testimony that because of the termination, he lost not only the opportunity to accrue additional pension benefits, but that he also lost medical benefits and that his life insurance was reduced did not cure his failure to define his ERISA claim clearly for trial purposes when the district court's Pretrial Order was entered.

The parties agree that Morgan's pension benefits under ERISA had vested prior to his termination.

ANR urges that we hold, as did the court in West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980) that "the legislative history [of Section 510 and 511] reveals that the prohibitions were aimed primarily at

preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested rights."

Morgan, on the other hand, relies on Kross v. Western Elec. Co., Inc., 701 F.2d 1238, 1242 (7th Cir. 1983) where the court pointed to the language in Section 510 which prohibits the discharge of an employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled" (emphasis in original), as clearly demonstrating the Congressional intent to "remedy a broad range of problems in the field of employment benefit plans." The Kross court found no support for the district court's conclusion that becasue Kross was already a participant in the insurance plans (vested), he was not prevented from attaining rights under the plan. The court concluded that Kross'

allegations stated a claim under Section 510 of ERISA because, if proven, he would establish that he was discharged for the purpose of interfering with the payment of certain medical and dental expenses he had incurred.

The district court did not reach the statutory interpretation issue discussed in West v. Western Elec. Co., supra, and Kross v. Western Elec. Co., supra, and we need not do so; we agree that Morgan has failed to present evidence demonstrating that ANR had the "specific intent" required to violate ERISA. Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3rd Cir.), cert. denied, 484 U.S. 979 (1987) (The loss of ERISA benefits under Section 510 must be the motivating factor, rather than a mere consequence, behind the termination of employment; a specific intent to interfere with the attainment of pension eligibility must be demonstrated).

We have previously held that the district court did not err in ruling that Morgan did not present sufficient evidence of an unlawful employment motivation on ANR's part in terminating his employment so as to withstand ANR's motion for summary judgment.

To the same effect, we hold that the district court did not err in ruling that Morgan failed to present sufficient evidence that ANR had the specific intent to interfere with Morgan's ERISA rights so as to withstand ANR's motion for summary judgment.

We AFFIRM.

Entered for the Court:

James E. Barret,
Senior United States
Circuit Judge

# APPENDIX C

## Petition for Rehearing En Banc

Filed May 7, 1990



UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

| | | |
|---|---|---|
| HARRY MORGAN, | ) | |
| | ) | |
| Plaintiff-Appellant | ) | |
| | ) | |
| | ) | Case No. |
| | ) | 89-3017 |
| v. | ) | (D.C. No. |
| | ) | 87-2239-0 |
| ANR FREIGHT SYSTEMS, INC., | ) | District |
| also known as | ) | of Kansas |
| GRAVES TRUCK LINES | ) | |
| | ) | |
| Defendant-Appellee. | ) | |
| | ) | |
| | ) | |
| AMERICAN ASSOCIATION OF | ) | |
| RETIRED PERSONS, | ) | |
| | ) | |
| Amicus Curiae | ) | |

PETITION FOR REHEARING EN BANC

Pursuant to the provisions of Rule 40 of the federal Rules of Appellate Procedure and 10th Cir. R. 40 Appellant Harry Morgan respectfully petitions the Court to grant a rehearing En Banc and for reconsideration of the appeal in the above-entitled cause of action.

This is an action for both legal and equitable relief under the Age

Discrimination in Employment Act of 1967 (ADEA) as amended, 29 U.S.C. Section 621, et seq., and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1140, et seq, which was filed on May 21, 1987 in the United States District Court for the District of Kansas, by Plaintiff-Appellant, Harry Morgan, who was age 57 at the time of his layoff on February 21, 1986, against defendant-appellee, ANR Freight Systems, Inc. Mr. Morgan alleged discrimination in ANR's laying him off while retaining younger less experienced persons and failing to rehire him when openings occurred. Appellant also alleged that ANR deprived him of his rights protected by the ERISA.

The Court held Morgan met the first three requirements of the prima facie ADEA case but had failed to establish the fourth prong of the test. The Court in its opinion overlooked several facts and did

not give due weight to its own test established for reduction-in- force cases. The Tenth Circuit has held that the fourth element in a reduction in force can be met by the employee presenting some evidence that the older employee was treated less favorably than the younger employee. Branson v. Price River Coal Co., 853 F.2d. 768, 771 (10th Cir. 1988). The 10th Circuit has also held that this proof may be completed with "circumstantial evidence that plaintiff was treated less favorably than younger employees." Branson, 853 F.2d at 771. The test set forth in Branson is consistent with that of other Circuits. See Montana v. First Federal Savings and Loan Association, 1989 W.L. 14948 (2nd Cir. 1989); Healy v. New York Life Insurance Co., 860 F.2d 1209 (3rd Cir. 1988); Herold v. Hajoca Corp., 864 F. 2d 317 (4th Cir. 1988). Mr. Morgan presented substantial evidence that he was treated less favorably

th younger employees including but not limited to:

1. ANR's own admission that at the time Mr. Morgan was laid off, persons younger and less qualified than Mr. Morgan were retained in similar terminal manager or similar managerial positions in the Kansas City region for which Mr. Morgan was equally or more qualified many of whom were not within the class of persons protected by the ADEA. (Doc. 80 at 5; Doc 93 at 20-22). Evidence that Scott Mann, who was younger than Morgan had worked under him in Iola and had many fewer years with ANR and less qualifications, was recalled by ANR within seven weeks of the reduction-in-force and assumed Morgan's job duties. (Doc. 80 at 6).

2. ANR's own admission that when determining which employees would be eliminated or retained neitherqualifications, experience, nor work records of the employees were considered. (Doc. 80 at 9-10).

3. ANR's own admission that it did not search for another position into which Mr. Morgan could be placed. (Doc. 80 at 4-5).

4. ANR's agents' statements that ANR's sole criterion in cutting its work force was reducing the amount it paid in salaries. (Doc. 80 at 9-10).

5. Evidence that the reduction-in-force disproportionately affected ANR's older employees. For example, four of the five affected terminal managers in ANR's Kansas City Region were in the protected

age group. (Doc. 76, Bullock Affidavit at 3), and eight of the 14 affected employees in ANR's Kansas City Region were in the protected age group. (Doc. 76, Bullock Affidavit at 3).

6. The fact that since February 21, 1986 ANR has hired terminal managers and operations managers in ANR's Kansas City and other terminals all who are younger than Morgan and have less years experience in the trucking industry and with ANR. (Doc. 93 at 16-19).

7. The fact that since February 21, 1986 ANR has hired salespersons who are younger than Morgan and have less years experience in the trucking industry and with ANR. (Doc. 93 at 16-17).

8. The fact that since February 21, 1986 ANR has rehired persons, all who had been hired after Morgan and had less experience in the trucking industry and with ANR (Doc. 93 at 17-19).

This evidence was more than sufficient to satisfy Morgan's burden on the prima facie case but was overlooked by the Court. All that was required of Morgan was to show some evidence of less favorable treatment than younger employees. This Morgan did. There can be no doubt that plaintiff was treated less favorably than younger employees. The focus in a reduction-in-

force case is less on why employees, in general are discharged and more on the older employee rather than another employee who was discharged. Thornbrough v. Columbus and Greeville R. Co., 760 F.2d. 633, 644 (5th Cir. 1985). The Court failed to focus on why Morgan was discharged, instead of focusing on the reason for the Reduction-in-force.

Instead, the Court held that Morgan did not present any evidence disputing ANR's articulated reason of poor economic conditions. The Court erred in overlooking Morgan's evidence on this issue. Mr. Morgan presented substantial evidence disputing ANR's articulated reason of poor economic conditions. Mr. Morgan's evidence included but was not limited to:

1. That only 14 persons were affected by the reduction-in-force (Doc. 76, Bullock Affidavit at 3), rather than the 78 persons alleged by ANR to be terminated in a nationwide reduction-in-force. ANR presented no evidence as to the identities of those other persons even though requested during discovery.

2. ANR Profit and Loss Statements show that in 1984 and 1985 the Iola and Ft. Scott terminals were operating at a profit. (Doc. 93 at 22, 25; Exhibits I & J);

3. A memo dated December 5, 1984 from Ainsworth to Management in ANR's Kansas City Region showing Kansas City Region operating at a profit. (Doc. 93, Exhibit KK);

4. ANR document titled, "Preliminary Report, 3rd Quarter, 1st Nine Months, 1985, 1984 Operating Ratios from ICC Quarterly Financial Report" dated November 8, 1985 shows ANR's Kansas City Region was operating at a profit in 1984 and 1985. (Doc 93. at 25; Exhibit LL);

5. ANR's admission that despite the effects of deregulation, Graves Truck Lines, (Kansas City Region) and ANR's Iola and Ft. Scott terminal were operating at a profit. (Doc. 93 at 22);

6. At the same time it claims it was reducing its workforce ANR was expanding its operations in the northeast and southeast part of the country. (Doc. 84 at 15; Doc. 93 at 23);

7. A memo dated 1985 from ANR's Vice President of Sales directed to ANR's agents regarding expansion into Mississippi and Birmingham, Alabama (Doc. 93, Exhibit H);

8. ANR's admission that the Iola terminal where plaintiff was terminal manager was never closed. (Doc. 80 at 4).

Thus Mr. Morgan certainly presented evidence which cast serious doubt on the validity of ANR's articulated reason. The Court failed even to take Mr. Morgan's evidence into account. It certainly did not accord the non-moving party, Mr. Morgan's evidence the respectful consideration which is required. Placed in the correct light, Appellant's evidence, at the very least, created a disputed factual issue which precluded the entry of summary judgment.

There were certainly genuine issues of material fact which were overlooked. As a result Mr. Morgan has been denied his Seventh Amendment right to a jury trial. The Court in making its ruling in this case did not consider the recent United States Supreme Court's decision in Lytle v. Household Manufacturing, Inc. dba Schwitzer Turbochargers, --- S.Ct. --- 1990 W.L. 27959 (U.S.). In that case the Supreme

Court unanimously reversed a dismissal by a district court, finding that the district court had improperly taken the case from the jury. Justice Marshall in delivering the opinion of the Court noted that a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b), and then not take the same case away from the jury because it might believe that the jury could reasonably find for the non-moving party. Appellant respectfully requests to the Court that the analysis utilized by the Supreme Court in this case also would be applicable to Mr. Morgan's case. There can be no question Mr. Morgan's interpretation of the evidence supporting his discriminatiory discharge claims was "reasonable" for a jury to find for Mr. Morgan and Mr. Morgan's evidence certainly presented genuine issues of material fact that precluded Summary Judgment. In light

of the Supreme Court's decision in Lytle this case should not have been dismissed on Summary Judgment. Mr. Morgan deserves his day in court.

## CONCLUSION

For the reasons set forth above, Appellant Harry Morgan respectfully requests that a rehearing en banc of the appeal in the above-entitled cause be granted.

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(816) 453-3119

Attorney for Appellant

CERTIFICATE

As counsel for the appellant, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises questions of exceptional importance to wit:

1. Whether the Supreme Court's ruling in Lytle v. Household Manufacturing, Inc. dbt Schwitzer Turbochargers, --- S. Ct. --- 1990 W.L. 27959 (U.S.) applies in ADEA cases where the employer has moved for Summary Judgment.

2. What amount (or quantum) of evidence is sufficient to withstand a summary judgment motion on the fourth prong of the prima facie case in a reduction-in-force situation.

3. Whether economic reasons for a reduction-in-force by itself is sufficient to satisfy the employer's burden of explaining why an older employee is terminated.

4. Whether evidence that younger employees were retained, recalled, and subsequently hired is sufficient to establish a prima facie case.

_____

Karen K. Howard

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Petition for Rehearing en banc was mailed, postage prepaid, on this 30th day of April, 1990, to:

John J. Yates
Gage & Tucker
2345 Grand Ave.
P.O. Box 418200
Kansas City, MO 64141

_____
Karen K. Howard

APPENDIX D

Order of the United States Court of Appeals for the Tenth Circuit denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| HARRY MORGAN,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>ANR FREIGHT SYSTEMS, INC. also known as Graves Truck Lines,<br><br>Defendant-Appellee.<br><br>AMERICAN ASSOCIATION OF RETIRED PERSONS,<br><br>Amicus Curiae. | ) | 89-3017 |

ORDER

Filed June 7, 1990

Before HOLLOWAY, Chief Judge, BARRETT, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's motion for leave to file petition for rehearing and suggestion for rehearing en banc out of time and

appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the motion to file the petition for rehearing and suggestion for rehearing en banc out of time is granted.

It is further ordered that the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk